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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

QUENTIN WILSON, Director,
Department of Revenue of the State of Missouri,
Petitioner,
v.
BURLINGTON NORTHERN
SANTA FE RAILWAY COMPANY,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Missouri imposes 4.225% sales and use taxes on purchases by and from businesses, including purchases of fuel. It exempts from those taxes purchases of fuel that are covered by an alternative 17¢ per gallon excise tax, and purchases of fuel by waterborne vessels while on navigable rivers. And it imposes a ceiling on taxes on the purchase of jet fuel by airlines. The question in this case, brought by a railroad taxpayer, is:

Whether, under Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11501(b)(4), a railroad becomes exempt from generally applicable state sales and use taxes on fuel purchases when a state grants other carriers exemptions from those particular taxes?

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PETITION FOR WRIT OF CERTIORARI

Quentin Wilson, Director of the Department of Revenue of the State of Missouri, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on October 22, 1999.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eighth Circuit is reported at *Burlington Northern Santa Fe*

Ry. Co. v. Lohman, 193 F.3d 984 (8th Cir. 1999), and is reprinted in the Appendix at page A-1. The order of the U.S. District Court for the Western District of Missouri is not reported, but is reprinted in the Appendix at A-7 The order of the Court of Appeals denying rehearing is reprinted in the Appendix at A-27.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on October 22, 1999. The motion for rehearing or rehearing en banc was denied on November 26, 1999. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS

49 U.S.C. § 11501 (Supp. II 1996):

(a) In this section--

> (1) the term "assessment" means valuation for a property tax levied by a taxing district;
>
> (2) the term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;
>
> (3) the term "rail transportation property" means property, as defined by the [Surface Transportation] Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part; and

(4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section--

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

MO.REV.STAT. § 142.803.1 (Cum. Supp. 1999):

A tax is levied and imposed on all motor fuel used or consumed in this state as follows:

(1) Motor fuel, seventeen cents per gallon . .

.

MO.REV.STAT. § 142.815.1 (Cum. Supp. 1999):

Motor fuel used for the following nonhighway purposes is exempt from the fuel tax imposed by this chapter. . . .

> (3) Diesel fuel used as heating oil, or in railroad locomotives or any other motorized flanged-wheel rail equipment, or used for other nonhighway purposes other than as expressly exempted pursuant to another provision.

MO.REV.STAT. § 144.020.1 (Cum. Supp. 1999):

A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:

> (1) Upon every retail sale in this state of tangible personal property, a tax equivalent to four percent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to four percent of the consideration paid or charged. . . .

MO.REV.STAT. § 144.030.2 (Cum. Supp. 1999):

> There are also specifically exempted from the provisions of . . . sections 144.010 to 144.525 and 144.600 to 144.745:
>
> (1) Motor fuel or special fuel subject to an excise tax of this state, . . .
>
> (26) Sales of fuel consumed or used in the operation of ships, barges, or waterborne vessels which are used primarily in or for the transportation of property or cargo, or the conveyance of persons for hire, on navigable rivers bordering on or located in part in this state, if such fuel is delivered by the seller to the purchaser's barge, ship, or waterborne vessel while it is afloat upon such river.

MO.REV.STAT. § 144.805.1 (Cum. Supp. 1999):

> In addition to the exemptions granted pursuant to the provisions of section 144.030, there shall also be specifically exempted from the provisions of sections 144.010 to 144.525. . .
>
> . . . all sales of aviation jet fuel in a given calendar year to common carriers engaged in the interstate air transportation of passengers and cargo, and the storage, use and consumption of such aviation jet fuel by such common carriers, if such common carrier has first paid to the state of Missouri, in accordance with the provisions of this chapter, state sales and use taxes pursuant to the foregoing provisions and applicable to the

> purchase, storage, use or consumption of such aviation jet fuel in a maximum and aggregate amount of one million five hundred thousand dollars of state sales and use taxes in such calendar year.

STATEMENT OF THE CASE

Missouri imposes sales and use taxes of 4.225% of the purchase price on all persons purchasing or consuming personal property in the state. MO.REV.STAT. § 144.020; 144.610.1.[1] Like all sales and use tax statutes, Missouri's includes a number of exemptions. Three were invoked by respondent Burlington Northern Santa Fe Railroad Co. ("Burlington Northern") in this suit.

First, Missouri exempts the sale of "[m]otor fuel or special fuel subject to a [Missouri] excise tax." *Id.* § 144.030.2(1). That exemption thus applies to the sale of "all motor fuel used or consumed in this state." *Id.* § 142.803.1(1) (Cum. Supp. 1999). Purchasers of such fuel -- who include Burlington Northern's principal non-rail competition -- pay an excise tax of 17¢ per gallon, rather than the 4.225% sales tax. Railroads are expressly exempt from the excise tax. *Id.* § 142.815.1(3) (Cum. Supp. 1999).

Second, Missouri exempts the sale of aviation jet fuel to a common carrier after that common carrier has paid $1.5 million in a calendar year. *Id.* § 144.805.1.

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[1] The base 4% is set in the referenced statutes. Additional taxes of .125% and .1% are imposed pursuant to Missouri Constitution art. IV § 43(a), § 47(a). Those conservation taxes are imposed on the same terms as the base tax.

And third, Missouri exempts the sale of fuel delivered to "ships, barges, or waterborne vessels . . . on navigable rivers." § 144.030(26).[2]

Burlington Northern filed suit against imposition of the sales and use tax, invoking § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act (4-R Act), 49 U.S.C. § 11501(b)(4). That section prohibits the states from imposing taxes that discriminate against a common carrier by rail. Burlington Northern sought to enjoin the Director of the Missouri Department of Revenue from collecting unpaid sales and use taxes on Burlington Northern's purchase and consumption of gasoline and diesel fuel in Missouri that is used for rail transportation purposes.[3]

On cross motions for summary judgment, the district court granted judgment for the Director. Considering the dual Congressional objectives of fostering competition between railroads and other common carriers and giving railroads

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[2] The term, "navigable rivers," is not defined in the statute. Its use in Missouri tax law began, however, before statehood: "[T]he river Mississippi, and the *navigable rivers* and waters leading to the same, shall be common highways, and forever free, as well to the inhabitants of the said state as to other citizens of the United States, *without any tax*, duty, impost or toll therefor imposed by the said state." Act of Admission, March 6, 1820, *reprinted at* MO.REV.STAT. v. 7 p. 8227 (1994) (emphasis added).

[3] At the time Burlington Northern filed suit, the Director of the Department of Revenue was Janette Lohman. Since that time, she has been replaced by Quentin Wilson. Under Fed.R.Civ.P. 25(d), he was automatically substituted as the defendant below and, consequently, is the petitioner in this Court.

equal, but not preferential tax treatment, the court compared railroads to two classes of taxpayers: all other taxpayers who pay the sales and use taxes; and railroads' competitors. (A-18.)

Asking whether Missouri's sales and use tax was targeted at railroads, the district court found that Missouri's sales and use taxes, paid by more than 80,000 businesses, are instead generally applicable. (A-23 - A-24.) The district court noted that Missouri provided exemptions to those taxes, but held that Missouri's exemptions are not illegally discriminatory because the 4–R Act does not expressly prohibit the states from carving out exemptions from their sales and use taxes. (A24 - A25.) Mindful that the 4–R Act impinges upon the states' sovereign power of taxation, the court concluded that federalism requires that the Act not be extended beyond its evident scope. (A-24 - A-25.)

Turning to the relative impact of Missouri sales and use taxes on transportation modes, the court held that Missouri does not single out railroads from among their competitors for illegally discriminatory taxation. (A-18 - A-21.) Because the 17¢ per gallon excise tax paid by motor carriers was more than four times the 4.225% sales and use taxes on fuel paid by railroads, the court concluded that Missouri favors the railroads, rather than the trucking industry. (A-19.) Because Burlington Northern admitted that airlines are not a significant competitor and presented no evidence that any railroad pays more than $1.5 million per year in taxes on fuel, the court concluded that the slight tax preference given to airlines is not significant as well. (A-20.) That left exempt from taxation on fuel only watercraft -- i.e., barges -- purchasing fuel while on navigable rivers. But the district court held that because Missouri's sales and use taxes are generally applicable, the exemptions from the sales and

use taxes for motor carriers, barge lines, and airlines are not illegally discriminatory. (A-20 - A-21.)

The court of appeals, by contrast, compares railroads only to their direct competitors -- and even then used a very narrow approach. (A-5.) The appeals court reasons that Congress intended to permit using more than one comparison class under § 11501(b), and that using all other taxpayers as the comparison class under § 11501(b)(4) would not promote restoration of railroad financial stability. (A-4.) Because trucks and barges are not subject to Missouri's generally imposed sales and use taxes, the court concludes that railroads are placed at a competitive disadvantage. (A-5.) In addition, following an Eighth Circuit precedent that it interprets to absolutely forbid consideration of even parallel taxes, the court refuses to take into account Missouri's excise tax on fuel of 17¢ per gallon. (A-5 - A-6.) The court holds that Missouri's 4.225% sales and use taxes on fuel discriminate against railroads and violate the 4-R Act. (A-6.)

REASONS FOR GRANTING THE WRIT

In deciding that Missouri's sales and use tax exemptions discriminate against railroads, the Court of Appeals for the Eighth Circuit implicitly holds that states do not have the same ability to grant tax exemptions under 49 U.S.C. § 11501(b)(4) as they do under § 11501(b)(1), (2), and (3). The court explicitly holds that to determine whether a tax is discriminatory, the proper comparison class for § 11501(b)(4) consists only of the railroads' direct competitors -- again, unlike the comparison classes used for § 11501(b)(1), (2), and (3). Those holdings directly conflict with the holdings of the Ninth Circuit in *Atchison, Topeka &*

Santa Fe Ry. Co. v. Arizona.[4] Moreover, their application here results in the curious and significant rule that a state cannot choose parallel modes for taxing competing industries -- a rule that, when applied as in this case, results in discrimination in favor of railroads. This Court should grant the petition and both resolve the conflicts between the Eighth and Ninth Circuits and decide whether Congress reduced state tax sovereignty so as to prevent the states from using parallel taxes on comparable transactions in a fashion that compels discrimination in favor of the railroads.

I. The Eighth and Ninth Circuits give conflicting answers to the question, "Can states exempt non-railroads from otherwise generally applicable sales and use taxes without violating § 11501(b)(4), as they can do for property taxes under § 11501(b)(1), (2), and (3)?"

Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act (4-R Act), 49 U.S.C. § 11501(b)(4) (Supp. II 1996), prohibits the states from imposing taxes that discriminate against a common carrier by rail. In *ACF Industries*, this Court held that Congress placed exempt property beyond the reach of subsection (b)(4), making a tax on railroad property not even subject to challenge on the ground that other classes of commercial and industrial property are exempt.[5] The Court based its holding on two

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[4] 78 F.3d 438, 443 (9th Cir.), *cert. denied sub nom. Arizona Cent. R.R. v. Arizona*, 519 U.S. 1029 (1996) (*ATSF (Arizona)*).

[5] *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 338–39, 343 (1994) (*ACF Industries*).

considerations: the structure of § 11501 as a whole; and the principles of federalism.

Both of the direct conflicts between the Eighth and the Ninth Circuits arise in the context of considering the structure of § 11501 as a whole. The Ninth Circuit treats § 11501(b) as one piece, with the same foundational rules applicable to all four of its subparts. The Eighth Circuit, by contrast, assigns one foundation to § 11501(b)(1), (2), and (3), but moves (4) to quite a different place. This Court should resolve those conflicts to enable the states to determine, as they structure their tax codes, just where they can build.

The first conflict appears in the courts' contrasting treatment of states' use of exemptions to tailor particular taxes. This Court held in *ACF Industries* that despite the broad prohibitions in the four subsections of § 11501(b), the states may grant exemptions from a generally applicable property tax without invalidating railroad taxation under any of its subsections.[6] Under subsections (b)(1)-(3), taxation of railroad property is compared to taxation of other "commercial and industrial property," which is defined in subsection (a)(4) as property "subject to a property tax levy." This Court observed that the term property "subject to a property tax levy" in subsection (a)(4) could bear one of two interpretations -- taxed property or taxable property, including property that is taxable but currently exempt.[7] This Court held that property "subject to a property tax levy" means taxed property.[8]

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[6] *ACF Industries*, 510 U.S. at 340.

[7] *ACF Industries*, 510 U.S. at 341.

[8] *ACF Industries*, 510 U.S. at 342.

That holding was consistent not only with the structure of § 11501, but with the principles of federalism. States have traditionally granted a wide range of exemptions from generally applicable property taxes. There is no clear and manifest purpose in § 11501 to impinge upon or pre-empt the states' traditional power to grant property tax exemptions.[9] Thus, the Court held, the states have been permitted to grant such exemptions without invalidating railroad taxation under subsection (b)(4), despite the absence of any language in any part of § 11501(b) that expressly permits exemptions.[10]

The Eighth Circuit implicitly recognizes the states' ability to grant exemptions from property taxes (A-4, n. 2), but effectively denies them the ability to grant exemptions from other taxes. It can not suggest that states have not traditionally granted a wide range of exemptions from sales and use taxes. It does not identify any purpose, much less a clear and manifest purpose, in § 11501 to impinge upon the states' power to grant such exceptions. Instead, the Eighth Circuit simply jumps past the "exemption" analysis to reach its result.

By contrast, the Court of Appeals for the Ninth Circuit directly addresses the "exemption" analysis of *ACF Industries* in the context of sales and use taxes and applies that analysis consistently to all subparts of § 11501(b). The Ninth Circuit concludes that "the logic advanced by the Supreme Court is equally applicable to the context of transaction privilege tax and use tax exemptions."[11] And the Ninth Circuit concludes that if Congress intended to restrict the states' power to

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[9] *Id.*

[10] *ACF Industries*, 510 U.S. at 344–45.

[11] *ATSF (Arizona)*, 78 F.3d at 443.

exempt non-railroad businesses from sales and use taxation, Congress would have done so explicitly.[12]

States in the Ninth Circuit can thus exempt classes of purchasers from generally applicable sales or use taxes without also exempting railroads. States in the Eighth Circuit cannot. This Court should grant the petition in order to eliminate that inequity.

II. The Eighth and Ninth Circuits give conflicting answers to the question, "What is the proper 'comparison class' when considering whether a state tax has discriminated against railroads in violation of § 11501(b)(4)?"

If a court is to determine whether any tax is discriminatory, it must decide which classes of taxpayers to compare. The second point at which the Eighth and Ninth Circuits diverge is in deciding what "comparison class" to use when addressing a claim that nonproperty taxes are illegally discriminatory under (b)(4).

Rather than look to all other commercial and industrial taxpayers, the Eighth Circuit uses the competitive mode comparison class. Thus, although the Missouri sales and use tax is applied to "a vast number of Missouri businesses" (A-2), the court focuses only on how the tax was applied to competitive transportation modes (A-5). And it looks only at the application of the tax to fuel, not its application to other purchases even by transportation competitors. The court feels compelled to go that direction by what it describes as the "broader purpose" of the statute, *i.e.*, the desire "to restore the railroads's financial stability." (A-4.)

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[12] *Id.*

The Ninth Circuit finds a narrower statutory purpose -- one more consistent with principles of federalism -- and thus took a road to a quite different comparison class. According to that court, the purpose of § 11501 is to "remedy discrimination against railroads and place them on an even playing field with other state taxpayers."[13] It is not to grant railroads "preferential treatment."[14] And to judicially grant a railroad what amounts to a tax exemption by declaring a particular generally applicable state tax to be illegally discriminatory is to "mandate preferential treatment favoring it over similarly situated taxpayers."[15] Subsection (b)(4) "merely protects railroads from discrimination, rather than conferring on them a right to be treated like the most favorably treated taxpayer."[16]

The Ninth Circuit reasons that in order for railroads to receive equal treatment with other taxpayers subject to the same tax law, railroads "must be compared with all others subject to the tax in question, not just compared to motor carriers."[17] A "narrow comparison class," consisting of only some of the taxpayers subject to the tax law, would result in preferential treatment for the railroads.[18] The Ninth Circuit

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[13] *ATSF (Arizona)*, 78 F.3d at 442.

[14] *Id.*

[15] *CSX Transp. Inc. v. Tennessee State Bd. of Equalization*, 801 F.Supp. 28, 35 (M.D. Tenn. 1992).

[16] *ACF Industries*, 510 U.S. at 352 (Stevens, J., dissenting).

[17] *ATSF (Arizona)*, 78 F.3d at 442.

[18] *Id.*

thus holds that railroads should be compared to all other taxpayers subject to Arizona's transaction-based privilege and use taxes.[19]

States in the Ninth Circuit can thus consider all commercial and industrial taxpayers, and all of their purchases and sales, when deciding whether an exemption from sales and use taxes for one type of transaction for one industry will violate § 11501(b)(4). States in the Eighth Circuit, by contrast, are limited to a very narrow focus: they must look, in this instance, only at purchases of fuel and only at transportation companies that compete directly with railroads. This Court should grant the petition in order to eliminate that inequity.

III. The Eighth Circuit's decision presents an additional and important question of federalism, "Whether Congress has eliminated the states' ability to use parallel means to tax the same transaction by different transportation modes?"

The Eighth Circuit requires that the court focus on a single tax with a specific label, rather than look at the transaction being taxed and consider parallel taxes that are imposed on the same type of transaction. The Eighth Circuit's decision thus strikes a serious blow against the states' ability to structure taxation to address differences among competitors and among similar transactions. Here, that choice resulted in railroads being excused from paying a 4.225% sales tax on the purchase of fuel, largely because their principal competitor, the trucking industry, instead pays a 17¢ per gallon excise tax on its fuel purchases. The Eighth Circuit relied on its holding in *Trailer Train (Missouri)*, which prohibited district courts from determining the "actual

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[19] *Id.*

discriminatory effect" state taxes have on railroads.[20] But the Eighth Circuit carries the *Trailer Train* rule too far. Under the guise of relieving district courts of the obligation to engage in detailed factfinding when considering a discrimination claim, the Eighth Circuit prohibits them from considering even parallel taxes to determine facial discrimination.

Missouri's sales and use taxes do not facially discriminate against railroads, as *Trailer Train (Missouri)* held Missouri's private car tax did. The private car tax was imposed only upon a single taxpayer -- freight line companies.[21] But Missouri's sales and use taxes are imposed upon all persons purchasing or consuming personal property or services in the state.[22] Moreover, exempting motor carriers from the 4.225% sales and use taxes on fuel,[23] but subjecting them to a 17¢ per gallon excise tax on fuel, [24] does not facially discriminate against railroads.

On the face of its statutes, Missouri discriminates in *favor* of railroads. As the district court observed, trucks pay about four times more tax per gallon on fuel than railroads pay. (A-19). Congress could not have intended for that to be

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[20] *Trailer Train Co. v. State Tax Comm'n of Missouri*, 929 F.2d 1300, 1302 (8th Cir.), *cert. denied*, 502 U.S. 856 (1991) (*Trailer Train (Missouri)*).

[21] *Id.*

[22] MO.REV.STAT. § 144.020.1(1) (Cum. Supp. 1999), § 144.610 (1994).

[23] MO.REV.STAT. § 144.030.2(1) (Cum. Supp. 1999).

[24] MO.REV.STAT. § 142.803.1(1) (Cum. Supp. 1999).

ignored. Thus the Ninth Circuit does not ignore that motor carriers in Arizona, though exempt from the transaction privilege and use taxes on fuel, pay a different tax when they buy fuel.[25] Nor does the Minnesota Supreme Court, in holding very recently that sales and use taxation of railroad purchase and consumption of fuel in Minnesota is not discriminatory under subsection (b)(4), ignore the contrast between the 2.6¢ to 4.2¢ per gallon sales and use taxes paid by railroads on fuel and the 20¢ per gallon excise tax paid by motor carriers.[26] Neither the Ninth Circuit nor the Minnesota Supreme Court answers the "actual discriminatory effect" question that the Eighth Circuit proscribed in *Trailer Train*. But that does not prevent them from reading related parts of the tax code rather than wearing blinders.

The Eighth Circuit, by blinding itself to even the black letters of Missouri's tax code, eliminates the requirement that railroads in Missouri pay any tax on fuel, while leaving in place a higher tax paid by railroads' main competitor. That is preferential, not equal, treatment. And it is mandated by a rule that would in essence preclude a state from taxing fuel purchases at the retail pump through a different mechanism than it uses to tax bulk purchases by railroads and other industrial users.

This Court should grant this petition and consider whether the states can still use different approaches to calculating taxes on such parallel transactions. In doing so, the Court may protect the railroads as much as the states. For unless the decision is reversed, the only practical alternative for states in the Eighth Circuit may be to impose the higher

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[25] *ATSF (Arizona)*, 78 F.3d at 439-40, 443.

[26] *Burlington Northern R.R. Co. v. Commissioner of Revenue*, 2000 WL 124669, at *8 (Minn.Sup.Ct. 2000).

excise tax on railroad purchases of fuel -- a result that cannot be reconciled with the Eighth Circuit's own description of the purpose of the 4-R Act: "to restore the railroads's financial stability." (A-4).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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